

**IN THE COURT OF APPEALS**  
**FIRST APPELLATE DISTRICT OF OHIO**  
**HAMILTON COUNTY, OHIO**

DONALD E. ZANG and ARLENE M.	:	APPEAL NO. C-140274
ZANG, as Executors of the Estate of	:	TRIAL NO. A-1203403
Robin Broxterman,	:	
	:	<i>OPINION.</i>
Plaintiffs-Appellants,	:	
vs.	:	
MATTHEW CONES,	:	
SHARYN CONES,	:	
MORNING PRIDE, LLC,	:	
and	:	
MOTOROLA, INC.,	:	
Defendants-Appellees.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause  
Remanded

Date of Judgment Entry on Appeal: June 26, 2015

**OHIO FIRST DISTRICT COURT OF APPEALS**

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*Jacobs, Kleinman, Seibel & McNally, John J. McNally, Norbert Scheper, Donald C. LeRoy and Donald R. Caster*, for Plaintiffs-Appellants,

*Raymond H. Decker Jr.*, for Defendants-Appellees Matthew and Sharyn Cones,

*Isaac, Wiles, Burkholder & Teetor, LLC, William B. Benson and Mark C. Melko*, for Defendant-Appellee Morning Pride, LLC,

*Taft, Stettinius & Hollister, LLP, and Michael A. Byers*, for Defendant-Appellee Motorola, Inc.

Please note: this case has been removed from the accelerated calendar.

**SYLVIA S. HENDON, Presiding Judge.**

{¶1} This is an appeal brought by plaintiffs-appellants Donald and Arlene Zang, the representatives of the estate of Captain Robin Broxterman. Broxterman, the Zangs' daughter, was a Colerain Township firefighter tragically killed in the line of duty while responding to a fire at the home of defendants-appellees Matthew and Sharyn Cones. The Zangs filed this wrongful-death action against the Coneses and defendants-appellees Motorola, Inc., and Morning Pride, LLC, the manufacturers of the radios and the protective gear that Broxterman had used and worn when fighting the fire that took her life.

{¶2} The Zangs challenge the trial court's grant of summary judgment to all defendants. We affirm the trial court's judgment with respect to Morning Pride. But we reverse the trial court's grant of summary judgment to the Coneses and Motorola, because there exist genuine issues of material fact with respect to the claims raised against those parties.

### ***Facts and Procedure***

{¶3} On April 4, 2008, Matthew and Sharyn Cones awoke to discover a fire in the basement of their Colerain Township home. While Sharyn called the fire department to report the fire, Matthew unsuccessfully attempted to put out the fire with an extinguisher and a bucket of water.

{¶4} At approximately 6:11 a.m., the Hamilton County Communications Center received notification of an alarm activation at 5708 Squirrelsneast Lane, the Coneses' residence. Engines 102 and 109, Ladder 25, and Battalion Chief Raymond Ellert were dispatched to the scene. Captain Broxterman, Firefighters Brian Schira

and Michael Vadnais, and a fire apparatus operator (“FAO”) were dispatched on Engine 102. Engine 102 was the first to arrive at the scene. The Coneses’ residence was not visible from the street, and Engine 102 passed the residence upon arrival. Broxterman exited from the fire truck and guided the vehicle as it reversed back to the Coneses’ home.

{¶5} After being informed by Matthew Cones that the fire was located in the basement, Captain Broxterman and Firefighter Schira advanced into the home carrying an uncharged attack line. Broxterman was not wearing her protective hood when she entered the home. Firefighter Vadnais entered shortly behind them, pulling more hose with him as he entered. All firefighters were wearing personal protective equipment (“PPE”) manufactured by Morning Pride. And all firefighters on the scene were using radios specially ordered by Colerain Township and manufactured by Motorola.

{¶6} After entering the home, Broxterman transmitted a request for water, which was heard by both Vadnais and Battalion Chief Ellert. But her request was not heard by the FAO at the hydrant, and the hose line was not charged. There was zero visibility because of smoke inside the home, and Vadnais followed the hose line to locate Schira and Broxterman. He found Broxterman at the top of the basement stairs “messaging” with her radio, and Schira on the basement steps. He and Schira advanced the hose line to the bottom of the stairs, where they ran out of line. The hose line still remained uncharged. As Vadnais advanced back up the stairs to retrieve more hose line, he passed Broxterman on the stairwell, and he instructed her to transmit a request for water. Vadnais was able to advance approximately 15 more feet of a still uncharged hose into the home. When he returned to the top of the

basement stairwell, Vadnais heard Broxterman attempting to use her radio and receiving what he described as a busy signal. Vadnais then heard Broxterman yell “mayday” approximately three times.

{¶7} At this point, conditions in the home were worsening. The kitchen had caught on fire, and drywall had begun falling on the firefighters. Vadnais saw Broxterman lying on the kitchen floor in the fetal position “playing with” her radio, but he was unaware of Schira’s location at that point. Vadnais successfully transmitted a request for water, and the hose line immediately charged. He attempted to advance down the basement stairwell with the charged line, but Broxterman grabbed him and instructed him to get out of the home. Vadnais followed the hose line outside, believing that Broxterman and Schira were following him. But when they never exited the structure, Vadnais reentered the home to find them. Vadnais proceeded on his stomach into the kitchen and down the basement steps, but was unable to locate Broxterman and Schira. He again exited from the home and informed both Engine 25’s Rapid Assistance Team (“RAT”) and Battalion Chief Ellert that Broxterman had called a mayday, but that she and Schira had not made it out of the home.

{¶8} Battalion Chief Ellert, who had assumed command of the scene upon his arrival, had previously attempted to contact Engine 102 to instruct them to redeploy, but had received no response. Ellert had been advised by the captain of Engine 109 that the back of the structure had basement access, and based on the changing conditions of the fire, it would be easier to attack the fire from that rear access. After conducting a Personal Accountability Report to determine the location of all firefighters and receiving no response from Broxterman and Schira, Ellert

called a mayday and assigned RAT 25 to enter the home and locate them. RAT 25 entered the basement from the rear of the structure and discovered the bodies of Broxterman and Schira in the basement. They had fallen into the basement when the fire caused a portion of the first floor to collapse.

{¶9} The fire was determined to have originated in an unfinished utility room in the basement. The Coneses grew orchids in that room, and a housing inside a plastic fan that had been used to provide ventilation for the orchids had ignited, causing the fire. In addition to growing orchids in their basement, the Coneses had also cultivated marijuana. They had hired a handyman to construct two small secret rooms in their basement for this endeavor. The wall and door to the rooms were designed to resemble the basement walls, so that it would not be obvious to an observer that there was an area behind the wall. The handyman also installed electrical outlets to provide electricity to the equipment used to cultivate marijuana, including growth lights and an exhaust fan used for circulation and to disperse the smell of the marijuana.

{¶10} Following the fire, Colerain Township conducted a lengthy investigation and issued an investigation analysis report. The report indicated that the following factors directly contributed to the deaths of Broxterman and Schira: a delayed arrival at the scene that allowed the fire to significantly progress, a failure to adhere to fundamental firefighting practices, and a failure to abide by fundamental firefighter self-rescue and survival concepts. The report further listed various ways in which the firefighters' deaths could have been prevented. Many of these suggestions concerned firefighting strategy, but the report also stated that the deaths could have been prevented if the communications system users were not vying for

limited radio air time, if the communications equipment and accessories utilized were more appropriate for the firefighting environment, and if the personal protective equipment had been utilized in the correct manner.

{¶11} Following Broxterman's death, the Zangs filed this wrongful-death action against the Coneses, Motorola, and Morning Pride. All defendants filed motions for summary judgment, which the trial court granted. The Zangs have appealed. In three assignments of error, they challenge the trial court's grant of summary judgment to all defendants.

### ***Summary Judgment***

{¶12} We review a trial court's grant of summary judgment de novo. *See Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriately granted when there exist no genuine issues of material fact, the party moving for summary judgment is entitled to judgment as a matter of law, and the evidence, when viewed in favor of the nonmoving party, permits only one reasonable conclusion that is adverse to that party. *See State ex rel. Howard v. Ferreri*, 70 Ohio St.3d 587, 589, 639 N.E.2d 1189 (1994).

### ***Motorola***

{¶13} In their first assignment of error, the Zangs argue that the trial court's grant of summary judgment to Motorola was in error.

{¶14} A more detailed description of the Motorola radios and Broxterman's use of her radio during the fire are instructive. In 2006, Colerain Township upgraded its communications equipment. Included in this change was a system upgrade to Motorola's 800 Megahertz digital trunked radio system that allowed for

intra-agency communication throughout Hamilton County. Colerain Township additionally provided each firefighter with a Motorola XTS5000 digital portable hand-held radio.

{¶15} The record contains a detailed radio-communications log summarizing all attempted and successful transmissions on the Motorola system made during firefighting operations at the Coneses' residence. The following is a summary of Broxterman's use of her radio during those operations. At 6:24:01, Broxterman transmitted "Engine 102 on the scene. Moderate smoke showing. Engine 102 will be Squirrelsnest command." At 6:26:56, Broxterman transmitted "Engine 102 is advancing into the structure at this time. Stand by." And less than ten seconds later, she transmitted "We need water." At 6:27:10, Broxterman's attempt to transmit was accepted, but no voice transmission was received. At 6:27:52, Broxterman transmitted "Engine 102 making entry in the basement, heavy smoke." That was Broxterman's last successful radio transmission. The communications log indicates that Broxterman attempted four additional transmissions, but that each attempt to transmit was rejected.

{¶16} The Zangs' complaint raised a products-liability claim against Motorola, alleging that the Motorola radio used by Broxterman during the fire had failed to function. The complaint specifically alleged that Broxterman's transmissions for water were not heard, that she had been unable to transmit a mayday despite repeated attempts, and that the failures in communication caused by the radio significantly delayed Broxterman's rescue and led to her death.

{¶17} Under Ohio's Products Liability Act, a product is defective in design if, "at the time it left the control of its manufacturer, the foreseeable risks associated

with its design or formulation \* \* \* exceeded the benefits associated with that design or formulation.” R.C. 2307.75(A). A product will not be considered defective unless the plaintiff demonstrates that a practical and technically feasible alternative design to the product was available and would have prevented the harm for which the plaintiff seeks to recover, without substantially impairing the usefulness of the product. *See* R.C. 2307.75(F).

{¶18} To succeed on a design-defect claim, a plaintiff must establish that the product was defective in design, the defective design was the proximate cause of the harm for which the plaintiff seeks to recover, and that the manufacturer designed the actual product that caused the plaintiff’s harm. *See* R.C. 2307.73(A).

{¶19} In support of their products-liability claim against Motorola, the Zangs retained the services of professional engineer Neil Shirk. Shirk determined that both Motorola’s digital trunked radio system and the ergonomics of the portable hand-held radios’ emergency buttons were defective. We address each critique in turn.

### **1. *Digital Trunked System***

{¶20} Shirk issued a report detailing his findings. As background, his report explained how a trunked radio system functions. The system operates by assigning users to a talk group. When a user wants to transmit, he or she pushes a “push to talk” switch on the radio. The radio then sends the trunking system a request to transmit on the control channel. If the requested talk group is free and there are available voice traffic repeaters, the trunking system assigns a voice traffic repeater to the call and then informs the requesting radio that it is free to transmit. The voice traffic repeater then retransmits the received transmission to other radio users on

the frequency. If, at the time a request to transmit is made, there are no available voice traffic repeaters, the trunking system places the request in a queue in order of priority, and it sends a busy message to the requesting radio. If resources do not become available for the requested user within a certain wait time, the trunking system transmits a message, or a “bonk,” to tell the requesting radio that the request to transmit failed.

{¶21} Shirk opined that the trunked radio system failed to meet the needs of the firefighters during the operations at the Coneses’ residence, and he offered various examples as to why the trunking system was ineffective. Shirk’s report indicated that 28 out of 88 attempted transmissions during the firefighting operations were rejected. He opined that this rejection rate of over 30 percent was unacceptable and exceeded the applicable industry standard. He explained that Broxterman had pushed her emergency button while in the basement of the Coneses’ residence, but that the “Hot Mic” feature on the radio had not functioned properly and no voice channel had opened for her. He felt that Broxterman had received an excessive rejection rate with respect to her attempts to transmit during the firefighting operations. Shirk opined that the excessive bonking, or rejection, was caused in part by nonresponders listening in on the radio conversation and affecting resource availability.

{¶22} Shirk further opined that the trunking system’s vocoder, which translates voice to digital, was not sufficient. He explained that Motorola utilized a half-rate vocoder, which performed poorly in a high-noise environment and could not distinguish between voice and background noise. Shirk opined that an analog-radio system would have been a better system for Colerain Township to have utilized.

On an analog system, users do not receive rejection signals or bonks. If a user on an analog system attempts to transmit while another user is already transmitting, the second user will talk over the first user, and both messages will be transmitted at the same time.

{¶23} Motorola filed a motion for summary judgment, arguing that its digital trunked radio system was not defective. In support of its motion, Motorola introduced an affidavit from David Mills, a chief software architect for Motorola. Mills explained that Broxterman's attempts to transmit had been rejected because another system user had been transmitting at the same time, not because channel resources were unavailable. He further explained that the Motorola radios were capable of transmitting in both digital trunked channels and analog channels, and that Hamilton County had elected to operate on the digital trunked system. With respect to Shirk's criticism that the "Hot Mic" feature on Broxterman's radio had failed to work, Mills stated that Colerain Township had not elected to enable that feature on its radios.

{¶24} Motorola also introduced an affidavit from Donald Wright, the president of Intelligent Communications Solutions, Inc. Wright explained that the vocoder utilized by Motorola complied with the applicable industry standards. Wright had analyzed the radio-communications log, and he explained that the log failed to indicate that Broxterman had experienced any rejected transmissions due to nonresponders listening in on the radio conversation.

{¶25} Following our review of the record, we hold that because the Zangs failed to demonstrate that a feasible alternative design was available, as is required by R.C. 2307.75(F), the trial court properly granted summary judgment to Motorola

on the Zangs' claim that the Motorola digital trunked system was defective in design. Shirk opined that an analog system would have served as a feasible alternative design to the digital trunked system. But that is not a valid alternative design for two reasons. First, Hamilton County specifically contracted with Motorola to provide a digital trunked radio system. Second, the Motorola radios could, in fact, have operated on an analog system. Mills' affidavit clearly explained that the radios were capable of transmitting on both analog and digital trunked channels. Hamilton County elected to operate on the digital trunked system.

{¶26} In the absence of a demonstration by the Zangs of a feasible alternative design, Motorola was entitled to summary judgment on the Zangs' allegation that the digital trunked system was defective in design.

#### ***Emergency Button***

{¶27} We now consider whether the Motorola portable hand-held radios were defective in design based on the ergonomics of the radios' emergency buttons.

{¶28} Shirk opined in his report that pushing the emergency button on the Motorola radio with gloved hands was extremely difficult, if not impossible, due to the small size and recessed location of the button. He expounded on this opinion during his deposition, where he also described in more detail the location of the emergency button. The emergency button on the Motorola radio was orange, was located next to the antenna, and was recessed slightly to avoid being inadvertently pushed. In his report, Shirk indicated that Broxterman had pushed her emergency button, but that no voice message had been received. During his deposition, Shirk conceded that the radio log did not actually indicate that Broxterman had pushed her emergency button. But he explained that he believed she had pushed the button

based on Vadnais' deposition testimony that he had heard Broxterman calling for a mayday. And because Broxterman's body had been found without a glove on one hand, Shirk believed that she had removed a glove to push the emergency button because she had been unable to push the button with a gloved hand.

{¶29} Shirk stated that, from an ergonomics standpoint, an emergency button should be visible, should be accessibly located near a landmark such as an antenna or knob so that it can be found in the dark, and should be large enough to be manipulated with a gloved hand.

{¶30} In support of its motion for summary judgment, Motorola introduced an affidavit from J. Gordon Routley, a division chief with the Montreal Fire Department. Routley stated that he personally used the Motorola XTS5000 radio, and that the emergency button could be manipulated while wearing gloves. He further stated that an emergency button should be easy to locate and activate, as well as be sufficiently protected to prevent accidental activations, and that the Motorola radios met both of these requirements. Both David Mills and Donald Wright likewise addressed Shirk's opinion regarding the emergency button in their affidavits. Mills stated that the radio call logs indicated that Broxterman had never pushed her emergency button. And Wright stated that the emergency button on the Motorola XTS5000 was placed at the base of the antenna and was easily located by finding the antenna and sliding one's fingers down it.

{¶31} Motorola argues that we need not address the merits of the Zangs' argument with respect to whether the radios were defectively designed based on the ergonomics of the emergency button because Shirk was not qualified as an expert to testify on the design of the emergency button. In support, Motorola cites Shirk's

deposition testimony in which he conceded that he had never transmitted on a Motorola XTS5000 radio or a competitor's radio, had never activated the emergency button, and had never performed an ergonomics analysis of emergency buttons on radios used by firefighters. The Zangs contend that expert testimony was not necessary to establish their design-defect claim.

{¶32} While expert testimony is often presented in products liability cases, it is not always necessary. *See Adkins v. Yamaha Motor Corp.*, 2014-Ohio-3747, 17 N.E.3d 654, ¶ 24 (4th Dist.). Where the subject matter involved is not overly complex and is within the knowledge and comprehension of a layperson, expert testimony is not necessary to establish a design-defect claim. *Id.* We hold that the design, placement, and functionality of a radio's emergency button does not involve a highly technical scientific matter and is within the knowledge and comprehension of a layperson. The Zangs were entitled to rely on circumstantial evidence to prove their claim. *Id.*

{¶33} Motorola further contends that the Zangs failed to offer a feasible alternative design for the emergency button. Shirk opined that the emergency button could not be pushed with a gloved hand because of its small size and recessed location. While he did not specifically provide a precise alternative design, at this stage of the proceedings, when we are required to view all evidence in the light most favorable to the Zangs, we find that Shirk's testimony can reasonably be interpreted to indicate that a larger, less recessed button would be a feasible alternative design to the emergency button currently on the Motorola radio.

{¶34} We hold that the record contains a genuine issue of material fact as to whether the foreseeable risks associated with the design of the emergency button, i.e.

an inability to push with gloved hands, exceeded the benefits associated with the current design of the emergency button.

{¶35} But Motorola argues that, even if the emergency button had been defectively designed, the record contains no evidence that an alternative design of the emergency button would have prevented Broxterman's death or that the Motorola radio was the proximate cause of Broxterman's death. Motorola cites the determination in Colerain Township's Investigation Analysis that a major factor in Broxterman's death was firefighter error, including Broxterman's initial failure to locate the Coneses' residence, failure to complete a 360-degree inspection of the home, failure to enter the home with a charged hose, and failure to follow the hose line out of the home.

{¶36} Proximate cause is generally an issue for the trier of fact to determine. *See Roark v. Belvedere, Ltd.*, 1st Dist. Hamilton No. C-950273, 1996 Ohio App. LEXIS 2387, \*17 (June 12, 1996). Here, genuine issues of material fact exist regarding not only whether the emergency button on the Motorola radio was defectively designed, but also whether Broxterman had attempted to push her emergency button, and whether she would have been rescued had the emergency button been activated.

{¶37} We hold that the trial court erred in granting summary judgment to Motorola on that portion of the Zangs' products-liability claim alleging that the emergency button on the radio was defectively designed. The first assignment of error is sustained in part and overruled in part.

*Morning Pride*

{¶38} In their second assignment of error, the Zangs argue that the trial court erred in granting summary judgment to Morning Pride. The Zangs' complaint raised a products-liability claim against Morning Pride, alleging both that Morning Pride's PPE was defectively designed and that Morning Pride had failed to adequately warn users of the limitations of its PPE. The trial court granted summary judgment on both aspects of the products-liability claim. On appeal, the Zangs are only challenging the trial court's grant of summary judgment on that portion of their claim alleging a failure to adequately warn.

{¶39} R.C. 2307.76(A)(1) provides that a product is defective due to an inadequate warning when both of the following apply:

- (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages;
- (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

{¶40} To succeed on a failure-to-warn claim, a plaintiff must prove that the defendant had a duty to warn against reasonably foreseeable risks, that the defendant breached that duty, and that the plaintiff suffered an injury proximately

caused by the defendant's breach. *Miller v. Alza Corp.*, 759 F. Supp.2d 929, 934 (S.D.Ohio 2010).

{¶41} Broxterman had been issued the following PPE manufactured by Morning Pride: a helmet, protective hood, coat, trousers, and suspenders. The record indicates that Broxterman failed to wear the issued protective hood when engaging in firefighting operations at the Coneses' residence

{¶42} In support of its motion for summary judgment, Morning Pride introduced an affidavit from Alan Schierenbeck, a senior product specialist for Honeywell First Responder Products, the parent company of Morning Pride. Schierenbeck stated that all Morning Pride PPE met the performance and design standard specified by the National Fire Protection Association. He further stated that all PPE manufactured by Morning Pride comes with a User Guide attached to it. The User Guides "stress the limitations of the full system and that even with the best protective equipment, a firefighter is always at risk, for among things, burns and death." The bunker coat, pants, and hood manufactured by Morning Pride each had an additional warning affixed to the product. According to Schierenbeck, these warnings met all applicable industry standards.

{¶43} The Zangs failed to introduce any opposing evidence to counter that offered by Morning Pride in their response to Morning Pride's motion for summary judgment. They argued that Morning Pride's warnings were too vague to be effective, but offered no evidence to support that assertion. When a party moving for summary judgment supports its motion with affirmative evidence, including affidavits and deposition testimony, demonstrating that there are no genuine issues of material fact, the opposing party must set forth specific facts demonstrating that

an issue of fact exists, and cannot rest merely on the allegations in its pleadings. *See Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *see also* Civ.R. 56(E).

{¶44} We find that Morning Pride introduced substantive evidence that it had not breached its duty to warn. And the Zangs failed to introduce any evidence to establish a genuine issue of material fact on that issue. Accordingly, we hold that the trial court did not err in granting Morning Pride summary judgment on the Zangs' products-liability claim asserting that Morning Pride had failed to adequately warn users of the limitations of its PPE. The second assignment of error is overruled.

***The Coneses and the Firefighter's Rule***

{¶45} In their third assignment of error, the Zangs argue that the trial court erred in granting summary judgment to Matthew and Sharyn Cones.

{¶46} The Zangs' complaint raised a wrongful-death claim against the Coneses. It alleged that, although the fire at the Coneses' residence had been sparked by a fan in their orchid-growing room, the hobby of growing orchids was merely a subterfuge for the Coneses' cultivation of marijuana. The complaint asserted that the Coneses' act of growing marijuana, and of growing orchids in an effort to conceal their marijuana cultivation, was willful and wanton, and that this willful and wanton conduct had proximately caused Broxterman's death.

{¶47} The Coneses moved for summary judgment on the ground that the "Firefighter's Rule" barred the Zangs' claim. The Zangs contended that the "Firefighter's Rule" was inapplicable because the Coneses' conduct had been willful and wanton. The trial court found that the rule applied, and it granted summary judgment on that basis.

{¶48} Generally speaking, the “Firefighter’s Rule” provides that an owner or occupier of private property is not liable to a firefighter who is injured on the premises while performing his or her official duties. *See Hawkins v. Imboden*, 1st Dist. Hamilton No. C-970827, 1998 Ohio App. LEXIS 3694, \*4 (Aug. 14, 1998). But an owner or occupier of private property can be liable if one of the following exceptions applies:

- (1) the injury was caused by the owner’s or occupier’s willful or wanton misconduct or affirmative act of negligence; (2) the injury was the result of a hidden trap on the premises; (3) the injury was caused by the owner’s or occupier’s violation of a duty imposed by statute or ordinance enacted for the benefit of fire fighters or police officers; or
- (4) the owner or occupier was aware of the fire fighter’s or police officer’s presence on the premises, but failed to warn them of any known, hidden danger thereon.

*Hack v. Gillepsie*, 74 Ohio St.3d 362, 368, 658 N.E.2d 1046 (1996).

{¶49} The Zangs contend that the Coneses are liable for the death of Broxterman based on the first exception, that their conduct was willful or wanton. Willful misconduct indicates “an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.” *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 938 N.E.2d 266, ¶ 32, citing *Tighe v. Diamond*, 149 Ohio St. 520, 527, 80 N.E.2d 122 (1948). Wanton misconduct constitutes “the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great

probability that harm will result.” *Id.* at ¶ 33, citing *Hawkins v. Ivy*, 50 Ohio St.2d 114, 117-118, 363 N.E.2d 367 (1977).

{¶50} In support of their motion, the Coneses filed Matthew Cones’ deposition. Cones had testified during his deposition that he had hired a handyman, his former half-brother-in-law Dan Ross, to construct a wall in his basement that would conceal two small rooms that were used to cultivate marijuana. The wall was designed to mirror the other basement walls and to prevent anyone from discovering that there were rooms behind it. Ross installed several electrical outlets on a separate circuit breaker for the purpose of providing electricity needed to grow the marijuana. Cones could not recall whether Ross had obtained the necessary permits for the electrical and construction work that he had completed. Cones also could not recall exactly when this electrical work had been performed, but believed it was “somewhere around 2005.” Only the Coneses, Ross, and one other person were aware of the concealed room.

{¶51} Cones explained that growth lights were operated approximately 12 to 18 hours a day in the marijuana room, and that he also operated a fan in the room to disperse the smell of marijuana and to prevent anyone from discovering it. The room was vented into the garage, but Cones had not made any inquiries about whether any extra ventilation systems were needed. Cones also described his orchid cultivation, which began in 2003 and which took place in a separate area and room of the basement. Like the marijuana cultivation, the cultivation of orchids required light and a fan. Cones had installed the exhaust fan in the orchid room himself.

{¶52} Following our review of the record, we hold that there exists a genuine issue of material fact as to whether the Coneses’ conduct was willful and wanton.

Viewing all facts and reasonable inferences in the light most favorable to the Zangs, we find that a reasonable mind could conclude that the Coneses' cultivation of orchids and marijuana was part and parcel of the same criminal enterprise, that the Coneses had cultivated orchids solely to conceal their marijuana-growing operation, and, consequently, that the fire in the orchid room exhaust fan was tied to the cultivation of marijuana. A reasonable mind could also conclude that the Coneses had failed to obtain the necessary permits and had performed electrical work in the orchid room themselves in an attempt to keep people away from their basement and from discovering their cultivation of marijuana, and that such behavior was willful and wanton.

{¶53} Because genuine issues of material fact exist with respect to whether the Coneses' conduct was willful and wanton, the trial court erred in granting summary judgment on the basis of the "Firefighter's Rule." The third assignment of error is sustained.

### ***Conclusion***

{¶54} We affirm both the trial court's grant of summary judgment to Morning Pride and its grant of summary judgment to Motorola on the portion of the Zangs' claim asserting that the digital trunked radio system was defective in design. But we reverse the trial court's grant of summary judgment to the Coneses and to Motorola on the portion of the Zangs' claim alleging that the radios were defective in design based on the ergonomics of the radios' emergency buttons, and we remand this cause for further proceedings.

Judgment affirmed in part, reversed in part, and cause remanded.

**FISCHER and STAUTBERG, JJ.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.